

**78B-9-402 Petition for determination of factual innocence -- Sufficient allegations -- Notification of victim -- Payment to surviving spouse.**

- (1) A person who has been convicted of a felony offense may petition the district court in the county in which the person was convicted for a hearing to establish that the person is factually innocent of the crime or crimes of which the person was convicted.
- (2)
  - (a) The petition shall contain an assertion of factual innocence under oath by the petitioner and shall aver, with supporting affidavits or other credible documents, that:
    - (i) newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent;
    - (ii) the specific evidence identified by the petitioner in the petition establishes innocence;
    - (iii) the material evidence is not merely cumulative of evidence that was known;
    - (iv) the material evidence is not merely impeachment evidence; and
    - (v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent.
  - (b) The court shall review the petition in accordance with the procedures in Subsection (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a). If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the attorney general.
- (3)
  - (a) The petition shall also contain an averment that:
    - (i) neither the petitioner nor the petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence; or
    - (ii) a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence.
  - (b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss the petition without prejudice and give notice to the petitioner and the attorney general of the dismissal, or the court may waive the requirements of Subsection (3)(a) if the court finds the petition should proceed to hearing based upon the strength of the petition, and that there is other evidence that could have been discovered through the exercise of reasonable diligence by the petitioner or the petitioner's counsel at trial, and the other evidence:
    - (i) was not discovered by the petitioner or the petitioner's counsel;
    - (ii) is material upon the issue of factual innocence; and
    - (iii) has never been presented to a court.
- (4) If the conviction for which the petitioner asserts factual innocence was based upon a plea of guilty, the petition shall contain the specific nature and content of the evidence that establishes factual innocence. The court shall review the evidence and may dismiss the petition at any time in the course of the proceedings, if the court finds that the evidence of factual innocence relies solely upon the recantation of testimony or prior statements made by a witness against the petitioner, and the recantation appears to the court to be equivocal or self-serving.
- (5) A person who has already obtained postconviction relief that vacated or reversed the person's conviction or sentence may also file a petition under this part in the same manner and form as described above, if no retrial or appeal regarding this offense is pending.

- (6) If some or all of the evidence alleged to be exonerating is biological evidence subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.
- (7) Except as provided in Subsection (9), the petition and all subsequent proceedings shall be in compliance with and governed by Rule 65C, Utah Rules of Civil Procedure, and shall include the underlying criminal case number.
- (8) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel shall cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which is the subject of the petition.
- (9)
  - (a) A person who files a petition under this section shall serve notice of the petition and a copy of the petition upon the office of the prosecutor who obtained the conviction and upon the Utah attorney general.
  - (b) The assigned judge shall conduct an initial review of the petition. If it is apparent to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in previous proceedings or presenting issues that appear frivolous or speculative on their face, the court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal upon the petitioner and the attorney general. If, upon completion of the initial review, the court does not dismiss the petition, it shall order the attorney general to file a response to the petition. The attorney general shall, within 30 days after receipt of the court's order, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.
  - (c) After the time for response by the attorney general under Subsection (9)(b) has passed, the court shall order a hearing if it finds the petition meets the requirements of Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual innocence regarding the charges of which the petitioner was convicted. No bona fide and compelling issue of factual innocence exists if the petitioner is merely relitigating facts, issues, or evidence presented in a previous proceeding or if the petitioner is unable to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes the petitioner's factual innocence.
  - (d) If the parties stipulate that the evidence establishes that the petitioner is factually innocent, the court may find the petitioner is factually innocent without holding a hearing. If the state will not stipulate that the evidence establishes that the petitioner is factually innocent, no determination of factual innocence may be made by the court without first holding a hearing under this part.
- (10) The court may not grant a petition for a hearing under this part during the period in which criminal proceedings in the matter are pending before any trial or appellate court, unless stipulated to by the parties.
- (11) Any victim of a crime that is the subject of a petition under this part, and who has elected to receive notice under Section 77-38-3, shall be notified by the state's attorney of any hearing regarding the petition.
- (12) A petition to determine factual innocence under this part, or Part 3, Postconviction Testing of DNA, shall be filed separately from any petition for postconviction relief under Part 1, General Provisions. Separate petitions may be filed simultaneously in the same court.
- (13) The procedures governing the filing and adjudication of a petition to determine factual innocence apply to all petitions currently filed or pending in the district court and any new petitions filed on or after June 1, 2012.
- (14)
  - (a) As used in this Subsection (14) and in Subsection (15):

- (i) "Married" means the legal marital relationship established between a man and a woman and as recognized by the laws of this state; and
- (ii) "Spouse" means a person married to the petitioner at the time the petitioner was found guilty of the offense regarding which a petition is filed and who has since then been continuously married to the petitioner until the petitioner's death.
- (b) A claim for determination of factual innocence under this part is not extinguished upon the death of the petitioner.
- (c) If any payments are already being made to the petitioner under this part at the time of the death of the petitioner, or if the finding of factual innocence occurs after the death of the petitioner, the payments due under Section 78B-9-405 shall be paid according to the schedule under Section 78B-9-405 to the petitioner's surviving spouse. Payments cease upon the death of the spouse.
- (15) The spouse under Subsection (14) forfeits all rights to receive any payment under this part if the spouse is charged with a homicide established by a preponderance of the evidence that meets the elements of any felony homicide offense in Title 76, Chapter 5, Offenses Against the Person, except automobile homicide, applying the same principles of culpability and defenses as in Title 76, Utah Criminal Code, including Title 76, Chapter 2, Principles of Criminal Responsibility.

Amended by Chapter 46, 2013 General Session